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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

PAUL NAVA,

Defendant and Appellant.

B154964

(Super. Ct. No. PA039086)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Charles L. Peven, Judge. Affirmed.

Jeffrey S. Kross, under appointment by the Court of Appeal, for Defendant
and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant
Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General,
Theresa A. Cochrane and Laura J. Hartquist, Deputy Attorneys General, for
Plaintiff and Respondent.

Appellant Paul Nava was convicted in a court trial of two counts of terrorist threats in violation of Penal Code section 422 and found to have two prior convictions within the meaning of Penal Code section 667.5, subdivision (b). Sentenced to prison for a term of five years and eight months, he appeals, contending he was deprived of his right to effective assistance of counsel at sentencing. For reasons explained in this opinion, we affirm the judgment.

FACTUAL AND PROCEDURAL SUMMARY

The evidence, briefly stated in the light most favorable to the judgment, proved that appellant had an eight-year history of violence and threatened violence against the mother of two of his children, Myryan Gaytan. On April 8, 2001, during a telephone conversation, appellant accused Ms. Gaytan of beating and starving the children and putting them in the closet. He threatened to kill her. In a telephone conversation on June 21, 2001, appellant told Ms. Gaytan he would kill her in church the following Sunday to make an example of her. He also threatened to kill her if she went to the police. Later the same day appellant telephoned Ms. Gaytan and invited her to a party at his house so he could rape and kill her. Then he laughed.

The evidence of appellant's prior convictions proved that appellant was sentenced to prison in 1994 for violating Vehicle Code section 10851 and sentenced to prison in 1997 for violating Penal Code section 245, subdivision (a)(1).

Appellant was removed from the courtroom during the sentencing hearing due to an outburst of obscene language. In his absence, the court imposed an upper term sentence, explaining that there were no mitigating factors, and citing as aggravating factors that "the offense involved threats of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness"

DISCUSSION

Appellant contends the court erred in using his threats as an aggravating factor because they were an element of the crimes of which he was convicted. He acknowledges that acts exceeding the minimum necessary to prove the elements of the crime may be used as aggravating factors. He argues, however, that there was no evidence of threats other than those for which he was convicted. He concedes forfeiture of this issue for failure to object in the trial court. He therefore phrases the issue in terms of ineffective assistance of counsel, arguing that there could be no satisfactory explanation for counsel's failure to object. He asserts that there is a reasonable probability the court would have imposed a mid-term sentence if counsel had objected.

Appellant's argument overlooks the fact that the reason stated by the court referred not only to the threats constituting the specific crimes of which appellant was convicted, but also to "other acts disclosing a high degree of cruelty, viciousness, or callousness" The court did not specify those acts, but the record reveals that appellant engaged in a course of conduct over a period of years that included threats to kill the children he fathered with Ms. Gaytan, a threat to beat Ms. Gaytan's husband, slapping Ms. Gaytan in the face, and throwing a beer bottle at her head. On April 8, 2001, appellant not only threatened to kill Ms. Gaytan, he placed his threatening phone call at 1:00 a.m., based his threat on the false accusation that she was starving, beating and imprisoning the children, and called several additional times, hanging up when Ms. Gaytan answered. On June 21, 2001, appellant not only threatened to kill Ms. Gaytan in church, but also threatened to kill her if she reported him to police, and laughed after threatening, in an additional call, to rape and kill her. These additional acts, which were not

elements of the charged crimes, clearly demonstrate a high degree of cruelty and callousness. (See *People v. Duran* (1982) 130 Cal.App.3d 987, 990.)

It follows that if counsel had objected on the ground now asserted by appellant, the objection would have been overruled. Therefore appellant has failed to demonstrate that his counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688; *In re Avena* (1996) 12 Cal.4th 694, 721.)

DISPOSITION

For the foregoing reasons, the judgment is affirmed.

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VOGEL (C.S.), P.J.

We concur:

EPSTEIN, J.

HASTINGS, J.